

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

| | |
|---|--------------------------------|
| DANIEL A. RAMET, | Case No. 3:14-cv-00452-MMD-WGC |
| <div style="border-left: 1px solid black; padding-left: 10px;">v.</div> | ORDER |
| ROBERT LeGRANDE, <i>et. al</i> , | |
| <div style="border-left: 1px solid black; padding-left: 10px;">Respondents.</div> | |

Before the Court for a decision on the merits is an application for a writ of habeas corpus filed by Daniel A. Ramet, a Nevada prisoner. (ECF No. 9.)

I. PROCEDURAL BACKGROUND¹

On June 4, 2007, a jury in the state district court for Clark County, Nevada, found Ramet guilty of first degree murder. After a sentencing hearing the following day, the jury imposed a sentence of life without possibility of parole. The court entered a judgment of conviction on August 31, 2007. Ramet appealed.

On June 4, 2009, the Nevada Supreme Court affirmed the conviction in an opinion that discussed in detail only one of Ramet's claims of error, that being his claim that testimony concerning his refusal to consent to a search of his home, coupled with the prosecutor's reference to it in closing argument, violated his Fourth Amendment rights. The Nevada Supreme Court found any error in admission of that evidence harmless, and it summarily denied the remainder of Ramet's claims in a footnote.

¹This procedural background is derived from the exhibits filed under ECF Nos. 10-14 and this Court's own docket.

1 On December 11, 2009, Ramet filed a proper person state habeas petition, which
2 the state district court ultimately denied without appointing counsel to represent Ramet.
3 The Nevada Supreme Court reversed the district court, finding the state district court
4 erred in failing to appoint counsel, and remanded to the district court for further
5 proceedings. Appointed counsel filed a supplemental petition. The state district court held
6 an evidentiary hearing and subsequently denied the petition. Ramet appealed. On July
7 22, 2014, the Nevada Supreme Court affirmed the denial of relief.

8 On August 28, 2014, this Court received Ramet's federal habeas petition. With the
9 assistance of appointed counsel, Ramet filed an amended petition on May 11, 2015. On
10 October 2, 2015, respondents filed a motion to dismiss, which the Court granted in part
11 and denied in part – that is, the Court concluded that Claim Ten was unexhausted and
12 that claims for relief in Claim Four that are not premised on ineffective assistance of
13 counsel (IAC) must be dismissed as procedurally defaulted,

14 In addition, the Court concluded that the IAC claims in Claims Four and Six are
15 also procedurally defaulted, but reserved judgment as to whether Ramet could
16 demonstrate cause and prejudice to overcome the default of those claims. Thereafter,
17 Ramet abandoned Claim Ten and the parties briefed the remaining claims on the merits.

18 **II. FACTUAL BACKGROUND**

19 The Nevada Supreme Court gave this summary of the facts of Ramet's case in its
20 opinion deciding his direct appeal:

21 Ramet killed his 20-year-old daughter, Amy Ramet, in the home they
22 shared. Ramet strangled Amy for a minute or two and then stopped; she
23 moved, and he checked for a pulse, and then he strangled her for "another
24 couple of minutes." He continued to live in his home with Amy's body for
three weeks, sending text messages from her cell phone to allay the fears
of his younger daughter, Delsie, and his ex-wife, Bernadette.

25 After not being able to speak with Amy for three weeks, Bernadette
26 and Delsie became so worried that they filed a missing person's report.
27 Three days later, unsatisfied with the police's efforts, they decided to break
28 into Ramet's home. Bernadette broke a window with a baseball bat and a
foul smell came out, prompting them to call the police. Shortly thereafter,
the police arrived at Ramet's home and the officers asked to perform a
welfare check on Amy. Ramet refused, claiming it was a "search and

1 seizure issue.” The police obtained a search warrant and discovered Amy’s
2 badly decomposed body in Ramet’s home. Ramet was arrested and he
3 confessed to killing his daughter.

3 *Ramet v. State*, 209 P.3d 268, 269 (Nev. 2009).

4 **III. STANDARDS OF REVIEW**

5 This action is governed by the Antiterrorism and Effective Death Penalty Act
6 (AEDPA). 28 U.S.C. § 2254(d) sets forth the standard of review under AEDPA:

7 An application for a writ of habeas corpus on behalf of a person in
8 custody pursuant to the judgment of a State court shall not be granted with
9 respect to any claim that was adjudicated on the merits in State court
proceedings unless the adjudication of the claim -

10 (1) resulted in a decision that was contrary to, or involved an
11 unreasonable application of, clearly established Federal law, as determined
by the Supreme Court of the United States; or

12 (2) resulted in a decision that was based on an unreasonable
13 determination of the facts in light of the evidence presented in the State
court proceeding.

14 28 U.S.C. § 2254(d).

15 A decision of a state court is "contrary to" clearly established federal law if the state
16 court arrives at a conclusion opposite that reached by the Supreme Court on a question
17 of law or if the state court decides a case differently than the Supreme Court has on a set
18 of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). An
19 "unreasonable application" occurs when "a state-court decision unreasonably applies the
20 law of [the Supreme Court] to the facts of a prisoner's case." *Id.* at 409. "[A] federal habeas
21 court may not "issue the writ simply because that court concludes in its independent
22 judgment that the relevant state-court decision applied clearly established federal law
23 erroneously or incorrectly." *Id.* at 411.

24 The Supreme Court has explained that "[a] federal court's collateral review of a
25 state-court decision must be consistent with the respect due state courts in our federal
26 system." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). The "AEDPA thus imposes a
27 'highly deferential standard for evaluating state-court rulings,' and 'demands that state-
28 court decisions be given the benefit of the doubt.'" *Renico v. Lett*, 559 U.S. 766, 773

(2010) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7 (1997); *Woodford v. Viscotti*, 537 U.S. 19, 24 (2002) (per curiam)). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The Supreme Court has emphasized "that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* (citing *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003)); see also *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing the AEDPA standard as "a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt") (internal quotation marks and citations omitted).

"[A] federal court may not second-guess a state court's fact-finding process unless, after review of the state-court record, it determines that the state court was not merely wrong, but actually unreasonable." *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004); see also *Miller-El*, 537 U.S. at 340 ("[A] decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding, § 2254(d)(2)."). Because *de novo* review is more favorable to the petitioner, federal courts can deny writs of habeas corpus under § 2254 by engaging in *de novo* review rather than applying the deferential AEDPA standard. *Berghuis v. Thompson*, 560 U.S. 370, 390 (2010).

IV. ANALYSIS OF CLAIMS

A. Claim One

In Claim One, Ramet alleges that he was denied his rights under the Fourth and Fourteenth Amendment because the prosecutor improperly elicited testimony about his invocation of his Fourth Amendment rights. In addressing this issue, the Nevada Supreme Court noted as follows:

///

1 At trial, the State presented testimony from two officers regarding
2 Ramet's refusal to consent to a search of his home. On the stand, Officer
3 Yant testified that Ramet's statements that he did not want the police in his
4 house because "it would be a search and seizure issue" made the police
5 even more suspicious. Officer Yant repeated Ramet's statement that "it
6 would be a search and seizure issue" two more times. Officer Bertges also
7 repeated Ramet's statement during his testimony.

8 In addition, evidence of Ramet's refusal to submit to a search was
9 used by the State to incriminate Ramet. During closing argument, the
10 prosecuting attorney commented on Ramet's refusal: "[a]nd when the police
11 come to the house on two different occasions, he won't even let them
12 conduct a welfare check. He's hiding something."

13 *Ramet*, 209 P.3d at 269.

14 The Nevada Supreme Court then concluded that the admission of the evidence
15 and the State's argument violated Ramet's constitutional rights under *Griffin v. California*,
16 380 U.S. 609 (1965). *Id.* at 269-70. The court also held, however, the error was harmless
17 under *Chapman v. California*, 386 U.S. 18 (1967), due to the "overwhelming evidence of
18 Ramet's guilt." *Id.* at 270.

19 In *Griffin*, the Court held that the trial court's and the prosecutor's comments on the
20 defendant's failure to testify violated the self-incrimination clause of the Fifth Amendment.
21 380 U.S. at 614. While Ramet's claim alleges a violation of his rights under the Fourth
22 Amendment, respondents do not dispute the Nevada Supreme Court's constitutional error
23 determination. Instead, they argue that this Court must defer to the state supreme court's
24 determination that the error was harmless under *Chapman*.

25 To determine whether a constitutional error is harmless under *Chapman*, a
26 reviewing court "must be able to declare a belief that it was harmless beyond a reasonable
27 doubt." *Chapman*, 386 U.S. at 24. If a state court finds an error harmless, the federal
28 habeas court reviews that determination under the deferential AEDPA standard, which
29 means that relief is not available for the error "unless the state court's harmlessness
30 determination itself was unreasonable." *Davis v. Ayala*, 135 S. Ct. 2187, 2199 (2015)
31 (quoting *Fry v. Pliler*, 551 U.S. 112, 119 (2007)).

32 And, even if the federal court determines the state court's application of *Chapman*
33 was unreasonable, the petitioner is still not entitled to relief unless he can establish that

1 the constitutional error “resulted in ‘actual prejudice.’” *Ayala*, 135 S.Ct. at 2197 (quoting
2 *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). Under *Brecht*, the federal court can
3 grant relief only if it has “grave doubt about whether a trial error of federal law had
4 ‘substantial and injurious effect or influence in determining the jury’s verdict.’” *O’Neal v.*
5 *McAninch*, 513 U.S. 432, 436 (1995). That is, “[t]here must be more than a ‘reasonable
6 possibility’ that the error was harmful.” *Ayala*, 135 S.Ct. at 2198 (quoting *Brecht*, 507 U.S.
7 at 637).

8 In finding the Fourth Amendment violation harmless, the Nevada Supreme Court
9 noted that “Ramet confessed during trial that he strangled his daughter, stopped and
10 checked her pulse, and then continued to strangle her.” *Ramet*, 209 P.3d at 270. Ramet
11 argues that the state court’s decision was unreasonable and that he can meet the *Brecht*
12 standard because the error had a “deep impact” on his defense and “was particularly
13 harmful because the evidence of first-degree murder was weak.” (ECF No. 41 at 11.²)

14 In this regard, he contends that evidence that he invoked his Fourth Amendment
15 rights suggested that he was being cold and calculated, which undermined his defense
16 that killing Amy was the result of a spur-of-the-moment impulse and that he immediately
17 regretted it. Also damaging to that defense, however, was evidence that Ramet kept
18 Amy’s corpse in the house for several weeks and went to great lengths to conceal her
19 death from his other daughter and ex-wife. And, given that Ramet now concedes that the
20 evidence proved second degree murder (ECF No. 41 at 23-25), this contention has merit
21 only if there was more than a reasonable probability that the jury relied upon the
22 invocation of his Fourth Amendment rights to find that the murder was premeditated and
23 deliberate. See NRS § 200.030. The time lag between the murder and Ramet’s attempts
24 to prevent the police from entering his home precludes such a conclusion.

25 Ramet also points to the extensive amount of testimony the State elicited on the
26 subject, the fact that a juror submitted a question to Ramet about it at the conclusion of

27 ²References to page numbers for documents filed electronically are based on
28 CM/ECF pagination.

1 his testimony, and the prosecutor's references to it in closing argument, all of which,
2 according to him, demonstrate the importance of the evidence to the State's case. This
3 is also unavailing. The State elicited the improper testimony in its case-in-chief, prior to,
4 and without knowing, that Ramet would subsequently provide the incriminating testimony
5 cited by the Nevada Supreme Court in its harmless error analysis. And while the
6 prosecutor stated in closing argument that Ramet's refusal to allow the police into his
7 house showed that he was "hiding something," the prosecutor did not explicitly argue that
8 it showed premeditation or deliberation. There is no dispute that the evidence was harmful
9 to the defense, but here again, there is not a reasonable probability that it prompted the
10 jury to find first degree murder rather than second degree murder.

11 In summary, Ramet fails to convincingly demonstrate that evidence and argument
12 regarding the invocation of his Fourth Amendment rights had a significant impact on the
13 jury's verdict. Claim One is denied.

14 **B. Claim Two**

15 In Claim Two, Ramet alleges that he was provided ineffective assistance of
16 counsel, in violation of his rights under the Sixth and Fourteenth Amendment, because
17 trial counsel failed to accurately advise him of the consequences of going to trial. In
18 support of this claim, Ramet alleges that the State offered a plea bargain that would have
19 resulted in him serving fifteen years to life that he turned down on the advice of counsel.
20 After trial, the jury sentenced him to life without parole.

21 Ineffective assistance of counsel claims are governed by *Strickland v. Washington*,
22 466 U.S. 668 (1984). Under *Strickland*, a petitioner must satisfy two prongs to obtain
23 habeas relief — deficient performance by counsel and prejudice. 466 U.S. at 687. With
24 respect to the performance prong, a petitioner must carry the burden of demonstrating
25 that his counsel's performance was so deficient that it fell below an "objective standard of
26 reasonableness." *Id.* at 688. "Judicial scrutiny of counsel's performance must be highly
27 deferential,' and 'a court must indulge a strong presumption that counsel's conduct falls
28 within the wide range of reasonable professional assistance.'" *Knowles v. Mirzayance*,

1 556 U.S. 111, 124 (2009) (citation omitted). In assessing prejudice, the court “must ask if
2 the defendant has met the burden of showing that the decision reached would reasonably
3 likely have been different absent [counsel’s] errors.” *Id.* at 696.

4 In addressing this claim in Ramet’s state post-conviction proceeding, the Nevada
5 Supreme Court identified *Strickland* as the federal law governing the claim. (ECF No. 14-
6 2 at 2.) The court adjudicated the claim as follows:

7 [A]ppellant argues that counsel was ineffective for discouraging him
8 from accepting the State’s guilty plea offer. Appellant has failed to
9 demonstrate deficiency. The reasonableness of counsel’s actions [is]
10 evaluated as of the time of the action, not through “the distorting effects of
11 hindsight.” *Strickland*, 466 U.S. at 689. Counsel testified that he had based
12 his recommendation to reject the plea offer on the evidence and appellant’s
13 own words, and that it was only after hearing appellant’s testimony at trial,
14 the full contents of which he “didn’t see ... coming,” that he realized he
15 should have counseled him to accept the plea offer. Further, appellant’s
16 case is distinguishable from *Lafler v. Cooper*, in which the parties stipulated
17 that counsel was deficient where counsel’s advice was based upon a
18 misunderstanding of the legal requirements to obtain a conviction. 566 U.S.
19 [156], 132 S. Ct. 1376, 1384 (2012). Here, the parties did not stipulate that
20 counsel was deficient, and there is no allegation that counsel
21 misunderstood the applicable law. Accordingly, appellant failed to
22 demonstrate by a preponderance of the evidence that counsel’s advice, at
23 the time it was given, was objectively unreasonable. We therefore conclude
24 that the district court did not err in denying this claim.

25 (*Id.* at 3.)

26 In *Lafler*, the allegation was that petitioner had rejected favorable plea offers “after
27 his attorney convinced him that the prosecution would be unable to establish his intent to
28 murder” because the victim “had been shot below the waist.” *Lafler*, 566 U.S. at 161. The
Supreme Court confirmed that the *Strickland* test applies to the plea bargaining process
when a defendant rejects a plea offer and elects to go to trial. *Id.* at 163. The Court also
rejected the notion that a fair trial “wipes clean any deficient performance by defense
counsel during plea bargaining.” *Id.* at 169-70. As the Nevada Supreme Court noted,
however, the question whether counsel’s performance fell below the *Strickland* standard
was not an issue decided in *Lafler*. *Id.* at 163. Thus, other than stating that counsel’s
advice was concededly deficient, the Supreme Court in *Lafler* did not provide any
standards under which lower courts are to evaluate the sufficiency of a trial counsel’s

1 performance in rendering plea advice. See *id.* at 174 (stating that deficient performance
2 had been conceded by all parties, so there is no need to address what type of
3 performance would be required to find counsel to be constitutionally ineffective).

4 The Court in *Lafler* did note, however, that “an erroneous strategic prediction about
5 the outcome of a trial is not necessarily deficient performance.” *Id.* In the case below, the
6 Sixth Circuit had “found that respondent's attorney had provided deficient performance
7 by informing respondent of ‘an incorrect legal rule.’” *Id.* at 162. The *Lafler* Court suggested
8 that respondent's counsel may not have provided ineffective assistance if he simply
9 thought the fact that the shots hit victim below the waist “would be a persuasive argument
10 to make to the jury to show lack of specific intent,” as opposed to believing that it
11 precluded a “convict[ion] for assault with intent to murder as a matter of law.” *Id.* at 174.

12 Similarly, the Ninth Circuit has held that, in the plea advice context, “[c]ounsel
13 cannot be required to accurately predict what the jury or court might find, but he can be
14 required to give the defendant the tools he needs to make an intelligent decision.” *Turner*
15 *v. Calderon*, 281 F.3d 851, 881 (9th Cir. 2002). In *Turner*, the defendant alleged ineffective
16 assistance, in part, because counsel advised him that 15 years to life was the worst
17 possible outcome, and that his case was not a “death penalty” case. *Id.* at 880-81.
18 Consequently, the defendant turned down a second-degree murder plea offer and went
19 to trial, where he was convicted of first-degree murder and robbery and subsequently
20 sentenced to death. *Id.* at 861.

21 The court held that the defendant “was informed that he was subject to the death
22 penalty, and of the plea offer,” in contrast to cases where an attorney failed to advise his
23 client of a plea offer or misled his client about the law. *Id.* at 881 “That counsel and [the
24 defendant] chose to proceed to trial based on counsel's defense strategy and presumably
25 sincere prediction that the jury would not award a sentence of death, does not
26 demonstrate that Turner was not fully advised of his options.” *Id.* The Ninth Circuit has
27 also held that although “a mere inaccurate prediction, standing alone, would not constitute
28 ineffective assistance, the gross mischaracterization of the likely outcome . . . combined

1 with the erroneous advice on the possible effects of going to trial, falls below the level of
2 competence required of defense attorneys.” *Womack v. Del Papa*, 497 F.3d 998, 1003
3 (9th Cir. 2007) (internal quotation marks omitted) (quoting *Iaea v. Sunn*, 800 F.2d 861,
4 865 (9th Cir. 1986)).

5 In this case, Ramet was charged with open murder, which included first degree
6 murder, second degree murder, and voluntary manslaughter as possible verdicts. (ECF
7 No. 12-3 at 5.) Other than specifically-enumerated types of murder not pertinent here, the
8 difference between first degree murder and second degree murder, in Nevada, is that the
9 former requires that the killing be “willful, deliberate, and premeditated.” *Byford v. State*,
10 994 P.2d 700, 719 (Nev. 2000). Voluntary manslaughter requires “a serious and highly
11 provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion
12 in a reasonable person, or an attempt by the person killed to commit a serious personal
13 injury on the person killing.” NRS § 200.050.

14 In a non-capital case, the possible sentences resulting from a first degree murder
15 conviction are (1) life without the possibility of parole, (2) 20 years to life, or (3) 20 years
16 to 50 years. NRS § 200.030(4)(b). A second degree murder conviction allows for parole
17 eligibility after serving ten years, while a voluntary manslaughter conviction results in a
18 sentence of one to ten years. NRS §§ 200.030(5), 200.080.

19 At the outset of Ramet’s trial, the trial judge and the parties confirmed for the record
20 that the State had extended a plea offer of fifteen years to life that Ramet rejected. (ECF
21 No. 11-10 at 3.) The trial court made sure that Ramet was aware of the possible
22 sentences he faced if convicted of first degree murder. (*Id.*)

23 Ramet’s counsel, Norman Reed, testified at the state post-conviction evidentiary
24 hearing that it “was a very bad idea” for him to discourage Ramet from taking the deal
25 and that he “got it wrong.” (ECF No. 13-28 at 15.) Reed elaborated on that by testifying
26 that he “looked at the evidence and thought that . . . we really had a good shot at a
27 manslaughter,” but “in retrospect . . . evaluating the evidence and hearing [Ramet’s]
28 testimony . . . , it was very ill-advised to have told him to turn down such a good offer.” (*Id.*)

1 at 16.) Regarding the chances of a manslaughter verdict, Reed testified that their defense
2 strategy was that Ramet had killed his daughter in a heat of passion, without
3 premeditation or deliberation. (*Id.* at 18.) As for Ramet’s trial testimony, counsel testified
4 that “it played out” in a way he “completely didn’t see . . . coming” and that if he had had
5 a “better handle” on that, he “would’ve told [Ramet] to take the deal.” (*Id.*)

6 Ramet testified at the post-conviction evidentiary hearing that, prior to trial, Reed
7 “was mocking the [State’s] offer saying that they were adding five years for an
8 enhancement on some charge that was going to be made up.” (*Id.* at 34.) He further
9 testified that he (Ramet) was aware that the punishment for second degree murder was
10 ten to 25 years or ten to life and that he probably would have taken a deal with a minimum
11 sentence of 10 years, but that the State never offered less than 15 years. (*Id.* at 34-37.)
12 He also testified, however, that he would have first conferred with “Mr. Reed, who I had
13 a lot of confidence in and trust in.” (*Id.* at 36.)

14 Given Ramet’s confession to the police and statements Ramet made to his
15 daughter in recorded phone calls, Reed’s assessment of Ramet’s chances at trial was
16 clearly misguided. For one, he underestimated the possibility that the State would be able
17 to prove first degree murder. Most notable was Ramet’s admission to his daughter that
18 he had stopped strangling Amy when she passed out, but resumed when she “came to a
19 little bit.” (ECF Nos.10-12 at 4 and 10-14 at 4.) The State relied on this point to argue that
20 the murder was premeditated and deliberate. (ECF No. 12-2 at 6.)

21 Secondly, Reed overestimated the likelihood of a manslaughter verdict. The
22 defense’s case relied on evidence that Ramet was deeply depressed and suicidal at the
23 time of the killing. (ECF No. 12 at 29-36.) His wife had divorced him after meeting another
24 man online. (*Id.*) He had lost his long-time job as a bartender at a casino and was out of
25 money. (*Id.*) His house was in foreclosure and lacked power and running water. (*Id.*) He
26 had no money for food, and had to live off of dog and cat food. (*Id.*) Amy, who had recently
27 moved back into Ramet’s house, was unhappy about the living conditions. (*Id.* at 37.) On
28 the day of the killing, Amy was upset because there was no food. (*Id.*) After unsuccessfully

1 calling friends to bring her food, she came out of the bedroom, threw a glass object at
2 Ramet, and then began berating him — telling him that he was a loser and that he should
3 just kill himself. (*Id.*) Ramet “snapped” and “strangled her.” (*Id.*)

4 Based on these circumstances, Reed had at least some reason to believe the
5 State would not be able to prove premeditation and deliberation, but he was unjustifiably-
6 optimistic in predicting a “good shot at manslaughter.” As hurtful as Amy’s insults may
7 have been, they were hardly “a serious and highly provoking injury inflicted upon the
8 person killing, sufficient to excite an irresistible passion in a reasonable person.” See NRS
9 § 200.050. And, because the definition incorporates a “reasonable person” standard,
10 evidence that Ramet was emotionally distraught, with his personal life was in shambles,
11 was not necessarily relevant.

12 Notwithstanding the foregoing, this Court is not convinced that Reed’s
13 performance fell below the *Strickland* standard as applied in the plea bargaining context.
14 There is no evidence that his advice to Ramet included an “incorrect legal rule,” as
15 contemplated in *Lafler*. And, while Reed inaccurately predicted the outcome of Ramet’s
16 trial, the record does not demonstrate “gross error on the part of counsel” — i.e., the type
17 of error necessary to conclude that Reed was unconstitutionally deficient in advising
18 Ramet to turn down the plea offer. *Turner*, 281 F.3d at 881 (citation omitted).

19 Ramet was informed by counsel and the trial court that a first degree murder
20 conviction was a possible outcome and that such a conviction could result in a life
21 sentence without possibility of parole. In addition, Reed was not unreasonable in
22 believing, prior to trial, that the State would not be able to satisfy the elements of first
23 degree murder.³ It was Ramet’s testimony at trial that provided the strongest evidence of
24 premeditation and deliberation, including his admission that he “look[ed] for a pulse”

25 ///

26 ///

27 ³Indeed, Ramet argues at length in his reply brief, in support of Claim One, that
28 the State’s case for first-degree murder was weak. (ECF No. 41 at 16-25.)

1 before strangling Amy for “another couple of minutes.”⁴ (ECF No. 12 at 43-44.)
2 Accordingly, it was also not unreasonable for Reed to predict that the worst likely outcome
3 resulting from going to trial would be a second degree murder conviction with a ten to life
4 sentence — i.e., five years less than the State’s plea offer.

5 In sum, Reed’s advice to Ramet with respect to the State’s offer was not outside
6 the “wide range” of reasonable professional assistance. *Strickland*, 466 U.S. at 687.
7 Moreover, as the Supreme Court has stated, “[w]hen a state prisoner asks a federal court
8 to set aside a sentence due to ineffective assistance of counsel during plea bargaining,
9 our cases require that the federal court use a ‘doubly deferential’ standard of review that
10 gives both the state court and the defense attorney the benefit of the doubt.” *Burt v. Titlow*,
11 134 S.Ct. 10, 13 (2013). Because the Nevada Supreme Court’s decision denying relief is
12 reasonable and supported by the record, Ramet is not entitled to federal habeas relief on
13 Claim Two.

14 **C. Claim Three**

15 In Claim Three, Ramet alleges that he did not knowingly or voluntarily waive his
16 rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and the admission of his involuntary
17 confession violated his Fifth and Fourteenth Amendment rights. In support of this claim,
18 he contends that, before his confession to law enforcement, he had stayed up all night
19 surrounded by police and that, during the interrogation, the police applied psychological
20 pressure, discouraged him from getting an attorney, gave him legal advice instead of
21 providing him an attorney, and refused to allow him to contact his daughter until he
22 confessed. According to Ramet, his will was overborne, so he confessed.

23
24 ⁴Ramet made several admissions in his trial testimony that were significantly more
25 damaging than his statements to the police and to his daughter. For example, when asked
26 on cross-examination what he did when Amy moved a little bit after he choked her initially,
27 Ramet replied:

26 As I said, I tried to make a decision, check her, see what was going
27 on or not, and I figure at this time that she might be near dead, you know,
28 so I’m looking for a pulse . . .

(ECF No. 12 at 44.) This was presumably an example of testimony that Reed “didn’t see coming.”

1 As mentioned, the Nevada Supreme Court rejected several of Ramet's claims in a
2 footnote to its opinion on direct appeal.⁵ *Ramet*, 209 P.3d at 268 n.1. This claim was
3 among them. *See id.*

4 "[T]he determination whether statements obtained during custodial interrogation
5 are admissible against the accused is to be made upon an inquiry into the totality of the
6 circumstances surrounding the interrogation, to ascertain whether the accused in fact
7 knowingly and voluntarily decided to forgo his rights to remain silent and to have the
8 assistance of counsel." *Fare v. Michael C.*, 442 U.S. 707, 724–25 (1979) (citing *Miranda*,
9 384 U.S. at 475-477). The U.S. Supreme Court has held that "[t]he voluntariness of a
10 waiver of [the privilege against self-incrimination] has always depended on the absence
11 of police overreaching, not on 'free choice' in any broader sense of the word." *Colorado*
12 *v. Connelly*, 479 U.S. 157, 170 (1986). "[C]oercive police activity is a necessary predicate
13 to the finding that a confession is not voluntary . . ." *Connelly*, 479 U.S. at 167 (internal
14 quotation marks omitted). And, while the mental condition of the defendant may be a
15 significant factor in the "'voluntariness' calculus," that does not mean that "a defendant's
16 mental condition, by itself and apart from its relation to official coercion, should ever
17 dispose of the inquiry into constitutional 'voluntariness.'" *Id.* at 164.

18 The state court record does not support Ramet's claims of police coercion. Ramet
19 claims that before his arrest the police had him "under siege" in his house for ten hours.
20 (ECF No. 9 at 21.) What the record shows, however, is the following. Police were called
21 regarding a domestic disturbance at Ramet's home and, upon arriving around 8:00 p.m.,
22 found Ramet's ex-wife, holding a baseball bat, and his daughter in front of the house.
23 (ECF No. 11-11 at 13, 19.) The police also noted "a very foul odor" coming from a broken
24 window that smelled of "a decomposing human body." (*Id.* at 14, 20.) After officers

25 ⁵The Nevada Supreme Court summarily denied five of Ramet's direct appeal
26 arguments in the footnote. Even though the court did not explain its reasons for rejecting
27 these arguments, this Court must presume that the court adjudicated Ramet's federal law
28 claims on the merits for the purposes of 28 U.S.C. § 2254(d). *See Richter*, 562 U.S. at 99
("When a federal claim has been presented to a state court and the state court has denied
relief, it may be presumed that the state court adjudicated the claim on the merits in the
absence of any indication or state-law procedural principles to the contrary.").

1 knocked on the front door for several minutes, Ramet answered the door, but denied the
2 officers entry into the house. (*Id.* at 13-16, 20-22.) The officers then posted themselves
3 on each side of the house “just to make sure Daniel didn’t try to leave.” (*Id.* at 23.) Later
4 in the evening, detectives set up a command post at a junior high school across the street.
5 (*Id.*) Once the detectives obtained a search warrant, the SWAT team arrived about 4:15
6 a.m., pulled an armored vehicle up onto Ramet’s front lawn, and used a bullhorn to tell
7 Ramet to exit his house. (*Id.* at 16-17.) Ten to fifteen minutes later, Ramet came out of
8 the house and was arrested without incident. (*Id.*)

9 With respect to the interrogation, the transcript and videotape of the event show
10 that police detectives clearly advised Ramet of his *Miranda* rights prior to questioning him
11 and repeatedly acknowledged throughout the interview that he had the right to remain
12 silent and the right to state-provided counsel. (ECF Nos. 10-8/15). Police provided Ramet
13 with food, something to drink, and a restroom break. (*Id.*) The videotape also supports a
14 finding that the detectives were non-confrontational and did not, at any point, apply undue
15 pressure to obtain a confession. (ECF No. 15.) In addition, the transcript does not support
16 Ramet’s claim that the detectives would not allow him to call his daughter until he
17 confessed. They advised him that they would allow him to speak with her, to the extent
18 she was willing, at the conclusion of the interview, but they did not condition that
19 opportunity on him confessing to the murder. (ECF No. 10-8 at 32-33, 54-55.) In addition,
20 Ramet’s vague references to an attorney or wanting to talk to someone about his
21 “psychological situation” were not sufficient to invoke his right to counsel. (*Id.* at 9-11, 18-
22 19.) *See Davis v. United States*, 512 U.S. 452, 459 (1994) (holding that a “suspect must
23 unambiguously request counsel” to require that officers stop questioning).

24 Here, the totality of the circumstances surrounding the interrogation show Ramet’s
25 waiver of his *Miranda* rights was voluntary, knowing and intelligent. In addition, he has
26 not shown that his confession was the product of police coercion. The Nevada Supreme
27 Court’s denial of Ground Three was based on a reasonable determination of the facts and
28 ///

1 was neither contrary to, nor an unreasonable application of, clearly established federal
2 law, within the meaning of 28 U.S.C. § 2254(d).

3 Claim Three is denied.

4 **D. Claim Four**

5 In Claim Four, Ramet alleges that police failed to honor his invocation of his right
6 to remain silent, in violation of his Fifth, Sixth, and Fourteenth Amendment rights, and that
7 trial and direct appeal counsel were ineffective for failing to raise this claim, in violation of
8 his Sixth and Fourteenth Amendment rights. According to Ramet, he invoked his right to
9 remain silent when the police arrived at his home and, therefore, any subsequent
10 statements made to the police should have been suppressed. He also claims that the
11 police coached his daughter to question him about Amy's death, so his statements to her
12 in their phone conversations should have also been suppressed.

13 In deciding respondents' motion to dismiss, this Court determined that this claim is
14 procedurally defaulted, but gave Ramet the opportunity to demonstrate that the default of
15 the IAC claims should be excused under *Martinez v. Ryan*, 566 U.S. 1 (2012). (ECF No.
16 34 at 4-6.) The Supreme Court recently confirmed that *Martinez* is confined to defaulted
17 claims of ineffective assistance of trial counsel and declined to extend the holding to
18 defaulted claims of ineffective assistance of appellate counsel. See *Davila v. David*, 137
19 S. Ct. 2058, 2070 (2017). Thus, only the default of Ramet's ineffective assistance of trial
20 counsel claims may be excused under *Martinez*.

21 In *Martinez*, the Supreme Court held that, in collateral proceedings that provide the
22 first occasion to raise a claim of ineffective assistance at trial, ineffective assistance of
23 post-conviction counsel in that proceeding may establish cause for a prisoner's
24 procedural default of such a claim. *Martinez*, 566 U.S. at 9. Ramet must show not only
25 post-conviction counsel's ineffectiveness but also "that the underlying ineffective-
26 assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner
27 must demonstrate that the claim has some merit." *Martinez*, 566 U.S. at 14. Because
28 these determinations are intertwined with the ultimate merit of Claim Four, the Court

1 deferred ruling on the cause and prejudice issue until the merits of the claim were briefed.
2 (ECF No. 34 at 6.)

3 As discussed above in relation to Claim Three, Ramet did not invoke his Fifth
4 Amendment rights after being given the *Miranda* warning prior to police questioning. He
5 contends in Claim Four, that the police were nonetheless not permitted to question him
6 because he had invoked his right to remain silent when the police first contacted him at
7 his home. Ramet is incorrect.

8 An invocation of the right to remain silent, like the right to counsel, must be
9 unambiguous. *Berghuis*, 560 U.S. at 381-82. This requirement applies regardless of
10 whether the statements allegedly invoking the privilege occur before or after the suspect
11 receives a *Miranda* warning. *Sessoms v. Grounds*, 776 F.3d 615, 621 (9th Cir. 2015).
12 Here, Ramet claims he invoked his right to remain silent when police came to his house
13 on the domestic disturbance call, but cites to no evidence to support this claim other than
14 police reports of that incident. (ECF No. 9 at 29.) Those reports indicate that, after the
15 police knocked on his door for several minutes, Ramet opened the door and spoke with
16 police, answering several questions. (ECF Nos. 10-4, 10-5, and 10-7.) While the reports
17 show that he refused to allow the police in his house and kept telling them to leave, there
18 is no indication that he expressly invoked his right to remain silent. *See Salinas v. Texas*,
19 133 S. Ct. 2174, 2179-82 (2013) (discussing “the express invocation requirement” and
20 confirming that “[a] suspect who stands mute has not done enough to put police on notice
21 that he is relying on his Fifth Amendment privilege.”).

22 Even assuming Ramet’s interaction with the police at his home could be construed
23 as an invocation of his right to remain silent, his post-*Miranda* statements to the police
24 and to his daughter were nonetheless admissible. Ramet relies on *Mosley v. Michigan*,
25 423 U.S. 96, 97 (1975), to claim that the police were required to honor his right to cut off
26 questioning. (ECF No. 9 at 29.) In *Mosley*, however, “the Supreme Court rejected the
27 proposition that its earlier decision in *Miranda* barred law enforcement officials from ever
28 questioning a suspect after the suspect had invoked his right to remain silent,” advocating

1 instead “a case-by-case approach that takes the concerns of the *Miranda* Court into
2 account.” *United States v. Hsu*, 852 F.2d 407, 409 (9th Cir. 1988).

3 Relying on *Mosley*, the court in *Hsu* held that the defendant's right to cut off
4 questioning was scrupulously honored where the defendant asserted his right to remain
5 silent during an initial interrogation, then answered questions during a second
6 interrogation after being advised again of his *Miranda* rights. *Id.* at 412. The court focused
7 on “the provision of a fresh set of *Miranda* rights” as “the most important factor” in arriving
8 at that conclusion. *Id.* at 411. The court also noted “the change of scenery” between the
9 two interrogations as another important factor. *Id.* at 412. Both of those circumstances
10 were present in Ramet’s case.

11 Because Ramet voluntarily waived his right to remain silent after being given the
12 *Miranda* warning, his confession to the police and his statements to his daughter in
13 subsequent phone calls were admissible at trial. The claim that counsel was ineffective
14 in failing to argue that Ramet had invoked his right to remain silent, as grounds for
15 suppressing either, is without merit for the purposes of *Martinez*.⁶ Thus, Claim Four is
16 dismissed as procedurally defaulted.

17 **E. Claim Five**

18 In Claim Five, Ramet contends that the State failed to prove the victim’s death was
19 the result of criminal agency, in violation of his rights under the Fourth and Fourteenth
20 Amendment. In support of this claim, Ramet argues that the only evidence establishing
21 that he was responsible for Amy’s death, were his own admissions, which in the absence
22 of sufficient independent evidence, is not sufficient to establish *corpus delicti* under
23 Nevada law. See *Sheriff, Washoe Cty. v. Middleton*, 921 P.2d 282, 286 (Nev. 1996).
24 Ramet contends that there was insufficient evidence at both the preliminary hearing and
25 the trial to establish *corpus delicti*.

26 ⁶To be clear, trial counsel did file motions to suppress with respect to Ramet’s
27 confession to the police and his phone calls to his daughter, both of which were denied.
28 (ECF Nos. 10-35, 10-36, and 10-(41-44).) Ramet’s claim is that counsel was ineffective
in failing to argue, in support of those motions, that Ramet had invoked his right to remain
silent.

1 Under Nevada law, the *corpus delicti* of murder requires proof of two elements: (1)
2 the fact of death; and (2) the criminal agency of another responsible for that death. *Hooker*
3 *v. Sheriff, Clark Cty.*, 506 P.2d 1262, 1263 (Nev. 1973). In addition, “[t]he *corpus delicti*
4 of a crime must be proven independently of the defendant's extrajudicial admissions.”
5 See *Doyle v. State*, 921 P.2d 901, 910 (Nev. 1996), *overruled on other grounds by*
6 *Kaczmarek v. State*, 91 P.3d 16, 29 (Nev. 2004). At a minimum, this requires a prima
7 facie showing by the State “permitting the reasonable inference that a crime was
8 committed.” *Id.* (citation omitted). The identity of the perpetrator is not an element of
9 *corpus delicti*. *State v. Fouquette*, 221 P.2d 404, 418 (Nev.1950)

10 In deciding respondents’ motion to dismiss, this Court concluded that Claim Five
11 presents a federal issue under *Jackson v. Virginia*, 443 U.S. 307 (1979). (ECF No. 34 at
12 8.) Under *Jackson*, the reviewing court asks “whether, after viewing the evidence in the
13 light most favorable to the prosecution, any rational trier of fact could have found the
14 essential elements of the crime beyond a reasonable doubt.” *Jackson*, 443 U.S. at 319
15 (citation omitted). Under AEDPA, “there is a double dose of deference that can rarely be
16 surmounted.” *Boyer v. Belleque*, 659 F.3d 957, 964 (9th Cir. 2011); see *Parker v.*
17 *Matthews*, 132 S. Ct. 2148, 2152 (2012) (per curiam) (describing habeas review of
18 sufficiency claims as applying a “twice-deferential standard”); *Coleman v. Johnson*, 132
19 S. Ct. 2060, 2062 (2012) (per curiam) (explaining that sufficiency claims “face a high bar
20 in federal habeas proceedings because they are subject to two layers of judicial
21 deference”). “[T]o grant relief, [the Court] must conclude that the state court's
22 determination that a rational jury could have found that there was sufficient evidence of
23 guilt, i.e., that each required element was proven beyond a reasonable doubt, was
24 objectively unreasonable.” *Boyer*, 659 F.3d at 965.

25 Here, respondents argue that the *corpus delicti* rule is not grounded in the U.S.
26 Constitution and, instead, is a creature of state law, the application of which is not
27 reviewable in federal habeas corpus proceedings. With respect to Ramet’s claim in
28 relation to the preliminary hearing, this Court agrees that his challenge to the sufficiency

1 of the evidence does not provide grounds for habeas relief. Indeed, Ramet would not be
2 entitled to habeas relief even if the State deprived him of a preliminary hearing altogether.
3 See *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975) (“[A] conviction will not be vacated on
4 the ground that the defendant was detained pending trial without a determination of
5 probable cause”); *United States v. Studley*, 783 F.2d 934, 937 (9th Cir.1986) (conviction
6 affirmed despite violation of statutory probable cause requirement).

7 As for the sufficiency of evidence at trial, Ramet cannot establish the that the
8 Nevada Supreme Court’s denial of his claim was objectively unreasonable.⁷ For one, the
9 *corpus delicti* rule he relies upon applies to *extrajudicial* confessions. See *Doyle*, 921 P.2d
10 at 910; see also *United States v. Kerley*, 838 F.2d 932, 939-40 (7th Cir.1988) (observing
11 that the *corpus delicti* rule is a “vestige of a time when brutal methods were commonly
12 used to extract confessions, sometimes to crimes that had not been committed”). Here,
13 Ramet testified at trial that he strangled his daughter. (ECF No. 12 at 37-38.) Thus, the
14 State did not need to rely upon his extrajudicial admissions to establish criminal agency.

15 Also, in conducting its *Jackson* analysis, “a reviewing court must consider all of
16 the evidence admitted by the trial court,’ regardless whether that evidence was admitted
17 erroneously.” *McDaniel v. Brown*, 558 U.S. 120, 131 (2010) (quoting *Lockhart v. Nelson*,
18 488 U.S. 33, 41 (1988)). Thus, even if the state trial court violated the *corpus delicti* rule
19 in admitting Ramet’s confession, the confession must nonetheless be factored into this
20 Court’s *Jackson* analysis. Because overwhelming evidence presented at trial establishes
21 that Amy’s death was the result of a criminal act, Claim Five fails.

22 **F. Claim Six**

23 In Claim Six, Ramet alleges that trial counsel was ineffective, in violation of his
24 Sixth and Fourteenth Amendment rights, for failing to request an instruction that the State
25 was required to prove *corpus delecti* beyond a reasonable doubt. Ramet contends that
26 he was prejudiced because “the jury was never instructed that it had to find, beyond a

27 ⁷The Nevada Supreme Court summarily rejected the claim in the aforementioned
28 footnote. *Ramet*, 209 P.3d at 268 n.1.

1 reasonable doubt and independent of Mr. Ramet's confession, that Ms. Ramet's death
2 was caused by criminal agency." (ECF No. 9 at 41-42.) Like Claim Four, this claim is
3 procedurally defaulted. (ECF No. 34 at 7.) Thus, as described in relation to Claim Four,
4 Ramet must show the claim has "some merit" in order for this Court to reach the merits.

5 He cannot make such a showing because Nevada law does not require the State
6 to prove *corpus delicti* both beyond a reasonable doubt *and* independent of the
7 defendant's confession. The Nevada Supreme Court has explained that, under the *corpus*
8 *delicti* rule, "the nature and degree of independent proof required to corroborate a
9 defendant's admission" is "not . . . beyond a reasonable doubt," but rather, "[a] slight or
10 prima facie showing, permitting the reasonable inference that a crime was committed."
11 *Doyle*, 921 P.2d at 910 (quoting *People v. Alcala*, 685 P.2d 1126, 1136 (Cal. 1984)).

12 Ramet's trial counsel did not perform below the *Strickland* standard, nor can Ramet
13 show prejudice, by virtue of counsel's failure to request a jury instruction not
14 countenanced by Nevada law. Thus, Claim Six is without merit for the purposes of
15 *Martinez* and is, therefore, dismissed as procedurally defaulted.

16 **G. Claim Seven**

17 In Claim Seven, Ramet alleges that trial counsel was ineffective, in violation of his
18 Sixth and Fourteenth Amendment rights, for failing to adequately investigate his mental
19 health and failing to adequately present this issue to the jury. According to Ramet, a
20 mental health expert "would have been able to explain how [his] severe depression
21 affected his mental state" and "would have been able to put [his] actions in context for the
22 jury in a way that no lay witness could." (ECF No. 9 at 42.) He further alleges that "[a]n
23 expert also may have shown that additional defenses were available to Mr. Ramet based
24 on his mental state." (*Id.*)

25 The Nevada Supreme Court addressed this claim in affirming the lower court's
26 denial of this claim in Ramet's state post-conviction proceeding. (ECF No. 14-2.) Having
27 identified *Strickland* as the federal law standard, the state supreme court held as follows:

28 ///

1 [A]ppellant argues that counsel was ineffective for failing to
2 adequately investigate his mental health through a psychological or
3 psychiatric evaluation. Appellant has failed to demonstrate prejudice.
4 Appellant failed to produce an expert witness or report at his evidentiary
5 hearing to indicate what the results of an evaluation would have been.
Accordingly, appellant failed to demonstrate a reasonable probability of a
different outcome had counsel obtained a psychological or psychiatric
evaluation. We therefore conclude that the district court did not err in
denying this claim.

6 (ECF No. 14-2 at 3-4.)

7 The Nevada Supreme Court's adjudication of the claim is entitled to deference
8 under § 2254(d). "[T]he presentation of expert testimony is not necessarily an essential
9 ingredient of a reasonably competent defense." *Bonin v. Calderon*, 59 F.3d 815, 834 (9th
10 Cir. 1995). More importantly, Ramet has presented no evidence setting forth the
11 testimony an expert witness would have provided or demonstrating that it actually would
12 have supported his defense. *See Wildman v. Johnson*, 261 F.3d 832, 839 (9th Cir. 2001)
13 (no ineffective assistance of counsel for failing to retain expert where petitioner did not
14 offer evidence that expert would have provided). In addition, mere conjecture as to the
15 availability of a favorable expert opinion is not sufficient to show prejudice. *See Grisbv v.*
16 *Blodgett*, 130 F.3d 365, 373 (9th Cir. 1997) ("Speculation about what an expert could have
17 said is not enough to establish prejudice.").

18 Claim Seven is denied.

19 **H. Claim Eight**

20 In Claim Eight, Ramet claims he was denied his right to due process by the
21 improper admission of evidence that he took Amy, then 17 years-old, and her best friend
22 out drinking. During the direct examination of the friend, the prosecutor asked: "Did you
23 ever go anywhere with the defendant as you got into high school?" (ECF No. 11-12 at
24 27.) She responded: "Yes, he would take us, me and Amy, downtown to watch the bands
25 and drink." (*Id.*) After a bench conference, the trial court struck the comment (*id.* at 28),
26 but Ramet claims that it was nonetheless unduly prejudicial because the jury had learned
27 that he not only had killed his daughter, but that he also had encouraged her to drink

28 ///

1 alcohol when she was a minor. He further alleges that the trial court's instruction to strike
2 the statement was insufficient to cure the harm caused by this testimony.

3 This claim is one of the claims the Nevada Supreme Court rejected in the footnote
4 to its opinion on direct appeal. *Ramet*, 209 P.3d at 268 n.1.

5 A state trial court's admission of evidence under state evidentiary law will form the
6 basis for federal habeas relief only where the evidentiary ruling "so fatally infected the
7 proceedings as to render them fundamentally unfair" in violation of the petitioner's due
8 process rights. *Jammal v. Van de Kamp*, 926 F.2d 918, 919 (9th Cir. 1991); *see also*
9 *Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009) ("The admission of evidence
10 does not provide a basis for habeas relief unless it rendered the trial fundamentally unfair
11 in violation of due process.") (citation omitted).

12 The U.S. Supreme Court has "defined the category of infractions that violate
13 'fundamental fairness' very narrowly." *Dowling v. United States*, 493 U.S. 342, 352 (1990).
14 The Court has declined to hold that evidence of other crimes or bad acts "so infused the
15 trial with unfairness as to deny due process of law." *Estelle v. McGuire*, 502 U.S. 62, 75
16 & n.5. (1991); *see also Spencer v. Texas*, 385 U.S. 554, 564-64 (1967) (rejecting
17 argument that due process requires the exclusion of prejudicial evidence). In sum, "[t]he
18 Supreme Court has made very few rulings regarding the admission of evidence as a
19 violation of due process." *Holley*, 568 F.3d at 1101. The Ninth Circuit in *Holley* noted that
20 the Supreme Court "has not yet made a clear ruling that admission of irrelevant or overtly
21 prejudicial evidence constitutes a due process violation sufficient to warrant issuance of
22 the writ" and that "[a]bsent such 'clearly established Federal law,' we cannot conclude
23 that the state court's ruling was an 'unreasonable application.'" *Id.* (citing *Carey v.*
24 *Musladin*, 549 U.S. 70, 77(2006)

25 Based on *Holley*, *Ramet's* claim is foreclosed by the absence of clearly established
26 Federal law "ruling that admission of irrelevant or overtly prejudicial evidence constitutes
27 a due process violation sufficient to warrant issuance of the writ." *Holley*, 568 at 1101.
28 This Court cannot conclude that the state court's ruling on this issue was either contrary

1 to, or an “unreasonable application” of, clearly established Federal law. And, even without
2 the deference required under AEDPA, the claim fails because there is no possibility that
3 the evidence had “a substantial and injurious effect or influence in determining the jury's
4 verdict.” *Brecht*, 507 U.S. at 637.

5 Claim Eight is denied.

6 **I. Claim Nine**

7 In Claim Nine, Ramet contends he was denied his right to due process by the
8 prosecutor’s improper remarks suggesting that he had committed other serious offenses.
9 Ramet cites to the prosecutor’s comment during closing argument wherein the prosecutor
10 provided examples of Ramet “minimizing” his past conduct and then stated, “And then
11 with the most serious offense of his life he again —.” (ECF No. 12-2 at 8.) At that point,
12 trial counsel objected to the prosecutor’s mischaracterization, pointing out, “[t]here’s no
13 other evidence of any other offense in his life.” (*Id.*) Ramet claims that the trial court
14 exacerbated the effect of the comment by stating: “Objection is noted but overruled. I
15 think that killing is pretty serious. I think it’s a fair comment.” (*Id.*)

16 This claim is also one of the claims the Nevada Supreme Court rejected in a
17 footnote to its opinion on direct appeal. *Ramet*, 209 P.3d at 268 n.1.

18 “Improper argument does not, per se, violate a defendant's constitutional rights.”
19 *Jeffries v. Blodgett*, 5 F.3d 1180, 1191 (9th Cir. 1993) (citations omitted). Habeas corpus
20 relief is available on grounds of improper argument only when the “prosecutor’s
21 comments so infected the trial with unfairness as to make the resulting conviction a denial
22 of due process.” *Darden v. Wainwright*, 477 U.S. 168, 171 (1986) (quoting *Donnelly v.*
23 *DeChristoforo*, 416 U.S. 637, 643 (1974)). Relief will be granted when the prosecutorial
24 misconduct amounts to constitutional error, and such error is not harmless under *Brecht*.
25 *Thompson v. Borg*, 74 F.3d 1571, 1577 (9th Cir. 1996) (“Only if the argument were
26 constitutional error would we have to decide whether the constitutional error was
27 harmless.”)

28 ///

This Court is not convinced that the comment was sufficient to cause the type of harm that would provide grounds for habeas relief. Placed in context, the comment was referring to “offenses” in a broader sense, not criminal offenses. Even though the trial court’s ruling appears to have missed the point of the objection, the comment was so fleeting as to have no appreciable prejudicial impact. Thus, it did not render the trial so unfair that it violated Ramet’s right to due process. The Nevada Supreme Court’s rejection of the claim was not unreasonable.

Claim Nine is denied.

V. CONCLUSION

For the reasons set forth above, Ramet's petition for habeas relief is denied.

Certificate of Appealability

This is a final order adverse to the petitioner. As such, Rule 11 of the Rules Governing Section 2254 Cases requires this Court to issue or deny a certificate of appealability (COA). Accordingly, the Court has *sua sponte* evaluated the claims within the petition for suitability for the issuance of a COA. See 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002).

Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner "has made a substantial showing of the denial of a constitutional right." With respect to claims rejected on the merits, a petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable jurists could debate (1) whether the petition states a valid claim of the denial of a constitutional right and (2) whether the court's procedural ruling was correct. *Id.*

Having reviewed its determinations and rulings in adjudicating Ramet's petition, the Court finds that the *Slack* standard is met with respect to one claim on the merits. Reasonable jurists could debate the Court's decision to deny Claim Two, above. The Court therefore will grant a certificate of appealability as to that issue. The Court declines

1 to issue a certificate of appealability for its resolution of any procedural issues or any of
2 Ramet's remaining habeas claims.


3 It is therefore ordered that Ramet's amended petition for writ of habeas corpus
4 (ECF No. 9) is denied. The Clerk will enter judgment accordingly.

5 It is further ordered that a certificate of appealability is granted as to the following
6 issue:

7 Whether Claim Two, alleging a violation of the Sixth and Fourteenth
8 Amendment due to trial counsel's inaccurate advice about the
consequences of going to trial, fails on the merits.

9 A certificate of appealability is otherwise denied.

10 DATED THIS 24th day of January 2018.

11
12
13 
14 MIRANDA M. DU
UNITED STATES DISTRICT JUDGE
15
16
17
18
19
20
21
22
23
24
25
26
27
28